No. 07-1049

May 5 08

In The Supreme Court of the United States

JOSEPH LAROSA;
LAROSA'S INTERNATIONAL FUEL CO., INC.,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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STATEMENT

The United States relies extensively on the case of *United States v. LaRosa*, 993 F. Supp 907; *aff'd*, No. 97-2782, 1998 WL 393976. In that case, the court ruled that Dominic LaRosa (who is not a party to the instant case but is the brother of Joseph LaRosa) was obligated to repay a refund of interest received pursuant to a claim for refund which had been filed with the Internal Revenue Service related to a different aspect of the same levy. The parties to the instant case were not involved in that case.

The distinguishing factor between *U.S. v. LaRosa* and the instant case is that in the case involving Dominic LaRosa, the claim included interest accrued on nonliquid assets. The instant case is expressly confined to credit for the interest which accrued on the liquid assets subject to the levies by the Internal Revenue Service, an amount in excess of $10 million.

If the rationale of the decisions in the case involving Dominic LaRosa had been the deciding factor on the issue of whether the Petitioners in the instant case were entitled to interest on the levied and escrowed funds, the courts below would not have needed to take the trouble to analyze entitlement to interest under the other theories. The courts below in the instant case recognized that confining the claim to interest accrued on liquid assets is a distinguishing fact which makes the instant case subject to its own separate rationale.

The Opposition of the United States misconstrues *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). The language in the Opposition on page 5 taken from *Whiting Pools* to the effect that the service of levies by the Internal Revenue Service is a so-called "provisional remedy" applies only to nonliquid assets. As discussed in the Petition for Writ of Certiorari, *Whiting Pools* and its progeny universally limit the delay of credit of the levied assets toward taxes to nonliquid assets such as furniture and equipment. A levy on nonliquid assets does not reduce those nonliquid assets to the immediate dominion and control of the Internal Revenue Service, under the rationale of *Whiting Pools* and the cases decided thereafter, until those assets are sold in satisfaction of the levy[1]. In this respect, the Opinion of the Court of Appeals for the Federal Circuit in the instant case is in conflict with *Whiting Pools* and with every other decision based on the *Whiting Pools* holding.

As discussed at length in the Petition for Writ of Certiorari, the case of *Rosenman v. United States*, 323 U.S. 658 (1945) does not involve a similar factual situation, nor is its holding applicable here. As noted in the Petition, the United States Court of Federal Claims has since distinguished *Rosenman*, as applied to the situation in the instant case. *Joan*

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[1] This stands to reason because, among other factors, the value of the nonliquid assets cannot be determined until they are sold, and in a situation involving the quasi-judicial sale of nonliquid assets, the titleholder can object to aspects of the sale, or even file bankruptcy to stop the sale, as in the *Whiting Pools* case.

Huskins, Personal Rep. of the Estate of Phillip Goldstein v. U.S., 75 Fed. Cl. 659; 99 AFRT 2d 2007-1728 (2007).

Rosenman does not apply to the instant situation primarily because the remittance in *Rosenman* was voluntary. In *Rosenman*, the taxpayer sent in a voluntary remittance which was held in suspense by the Internal Revenue Service pending the assessment of tax on a return, where the return was not filed until after the remittance. In the instant case, the Internal Revenue Service perfected a levy against the Petitioners' funds on the basis of a jeopardy assessment. In the instant case, the assessment predated the levy of funds. A more involuntary payment cannot be imagined. The Internal Revenue Service agreed to the LaRosas' escrow arrangement because the United States District Court, in response to the challenge to the jeopardy assessment, ordered that the levied funds be held in place and not be liquidated until the final decision was rendered on the legality of the underlying jeopardy assessment.

Under the rationale of the case of *United States v. National Bank of Commerce*, 472 U.S. 713 (1985), the service of the notice of levy places the levied liquid asset within the dominion and control of the Internal Revenue Service, and the levied funds are thereby considered a payment of the tax. Any subsequent disposition of the funds by the Internal Revenue Service does not eliminate entitlement of the levied taxpayer to interest on the levied funds. Otherwise, the Internal Revenue Service would be able to tie up the taxpayer's funds, as they did in

this case to the tune of in excess of $10 million of liquid assets, indefinitely without compensating the taxpayer under § 6601. Clearly, this is not what Congress intended when it provided for interest on overpayments. It might have been a different matter if the parties had entered into the escrow arrangement prior to the service of the levy notice. Under the holding in *National Bank of Commerce*, once the Internal Revenue Service perfects a levy, it must credit the taxpayer with the levied funds.

The two cases which involve escrow deposits or delayed payments after a levy, *Stone v. Commissioner*, United States Tax Court Memorandum Sur Order, U.S. Tax Court Docket No. 5311-72 (March 30, 1987) and *Berger et al. Ex'r of the Estate of Goldfarb v. U.S.*, 85-1 USTC ¶ 13,618; 56 AFTR 2d 85-6505 (S.D. NY 1985) both hold that the taxpayer is entitled to interest on the escrowed or delayed funds under 26 U.S.C. § 6601. The case of *Stead v. U.S.*, 419 F.3d 944 (9th Cir. 2005) does not contradict the holdings in *Stone* or *Estate of Goldfarb*, because the *Stead* case was decided after the effective date of the Taxpayer Bill of Rights, 26 U.S.C. § 6332(c). The Taxpayer Bill of Rights imposes a delay of 21 days between the date of the service of a levy notice by the Internal Revenue Service and the date on which the funds are turned over to the Internal Revenue Service by the custodian. During this period of time, the levy is subject to challenge by the taxpayer so it is not final, unlike the levy in *National Bank of Commerce* as well as the levy in the instant case. These levies predated the Taxpayer Bill of Rights and the levies became final when served.

The escrow agreement language does not state anywhere that the LaRosas are waiving entitlement to interest from the Internal Revenue Service by placing the levied funds into the escrow account. The escrow agreement language also preserves the jurisdiction of the United States Tax Court over the alleged deficiency assessed against the LaRosas. The Tax Court loses jurisdiction to redetermine a deficiency in tax once the tax has been paid and the deficiency no longer exists[2]. The language in the escrow agreement does not waive the taxpayer's claims for interest and it should not be interpreted against the taxpayers in a situation where their funds were deposited into the escrow only after levies were served by the Internal Revenue Service. Under the law in effect then, these levies became effective to reduce the funds to the dominion and control of the Internal Revenue Service on the date when the levies were served. Moreover, the Internal Revenue Service could have insisted on a provision in the escrow agreement that the escrowed funds would not bear interest chargeable against the United States, but no such provision appears in the document.

In the case of *Stone v. Commissioner*, United States Tax Court Memorandum Sur Order, U.S. Tax Court Docket No. 5311-72 (March 30, 1987), a copy of which was attached to the Petition for Writ of

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[2] The LaRosas were issued Notices of Deficiency after the escrow was established, and they challenged the deficiencies in the United States Tax Court, which resulted in a settlement reducing the assessment from in excess of $20 million to almost $3.5 million.

Certiorari, the Internal Revenue Service correctly stipulated that the taxpayers were entitled to interest on funds which were being held in the taxpayers' bank account pending final decision of the Tax Court. This stipulation does not distinguish the *Stone* holding from the situation in the instant case. The basis for this stipulation does not appear in the Memorandum Sur Order, and so it has little precedential value. If anything, this stipulation supports the Petitioners' contention that interest is due and payable by the Internal Revenue Service on the levied, escrowed funds; the Internal Revenue Service is merely taking a contrary position in the instant case.

It is hard to see how the facts in the *Stone* case are materially different from the escrow agreement in the instant case. Both agreements delayed the ultimate transfer of the funds to the Internal Revenue Service. The fact that the escrow agreement in the instant case contained a provision that funding the escrow did not result in a payment of tax does not distinguish the escrow agreement in the instant case from the one in *Stone*. The taxes in the instant case were paid under 26 U.S.C. § 6601 once funds equal to or in excess of the tax assessment, as finally determined, were levied. There are absolutely no cases or other precedent which holds that the escrow by the Internal Revenue Service of a taxpayer's funds, after the service of a levy notice becomes final, eliminates the taxpayer's entitlement to interest on any levied funds.

In *Barlows, Inc. v. United States*, 36 B.R. 826 (Bankr E.D. Va.), *aff'd*, 53 B.R. 986 (E.D. Va. 1984),

aff'd, 767 F.2d 1098 (4th Cir. 1985), the taxpayer was credited with funds levied by the Internal Revenue Service upon service of the levy notice. The subsequent events, i.e. the failure of the levied company to remit payments to the Internal Revenue Service, were held not to be relevant to whether the taxpayer became entitled to credit against tax for the levied funds immediately upon service of the levy notice. The taxpayer in *Barlows* was given immediate credit by the Circuit Court for the entire balance of the levy proceeds which the Internal Revenue Service could have collected, even though the total levied amount was never, in fact, actually collected. In that respect, the decisions below in the instant case conflict with this Circuit Court decision.

The fact that this Court denied certiorari in the case involving the other LaRosas is not relevant to the instant case was because that other case involved levies on non-liquid assets which were not subsequently liquidated, but instead were placed into escrow. As discussed at length, levies on non-liquid assets do not give rise to interest under § 6601, whereas levies on liquid assets, during the time period involved in this case, give rise to an immediate right to recover interest.

CONCLUSION

The Petitioners respectfully submit that it is appropriate to grant certiorari in this case, and that in doing so, this Court can clarify the entitlement of a significant number of taxpayers to interest on levied funds, as well as resolving conflicts with this Court's own opinions and among the circuits.

Respectfully submitted,

/s/

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